DARSHAN SINGH

v.

FARID KAMAL HUSSAIN

COURT OF APPEAL, PUTRAJAYA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: A-02-15-1997]
21 SEPTEMBER 2004

UNINCORPORATED ASSOCIATIONS: *Club - Suspension of member - Whether suspension in accordance with rules of natural justice and fair hearing*

The appellant and one Gitu Chakravathy ('Gitu') were members of the respondent social club. They were alleged to have abused and assaulted each other within the club's premises. Each lodged a complaint against each other that were referred to the Disciplinary Committee ('DC') appointed by the Main Committee ('MC') pursuant to r. 35(a) of the rules of the club. The DC suspended the appellant for four months and suspended Gitu for one month. The appellant appealed to the MC against the decision of the DC. The MC dismissed the appeal and enhanced the suspension order of the appellant from four to six months. The appellant then commenced an action in the High Court, *inter alia*, for a declaration that the decisions by the DC and MC were null and void and for an injunction restraining the respondent from suspending and preventing the appellant from using the club's premises. The High Court dismissed the appellant's claim and hence this appeal.

The issues raised by the appellant concerned the application of the rules of natural justice and fair hearing. He objected to the appointment of one Paul Maneksha as chairman of the DC alleging that the chairman was not in a position to act fairly against him on account of his past relationship with him. He also objected to the presence of one LY Hong and one Melvin Low in the meeting held by the MC, the reason being, that LY Hong gave evidence before the DC and that Melvin Low submitted the report on the incident that formed the complaint before the DC. The appellant also claimed a blatant breach of the rule of natural justice as the report by Melvin Low was not furnished to him and so he was deprived to answer any allegations made against him.

Held (allowing the appeal)
Per Arifin Zakaria JCA delivering the judgment of the court:

[1] The respondent was a social club governed by its constitution and rules. The rules of natural justice apply to the respondent. Therefore, members could not be arbitrarily expelled or suspended by the respondent without first being given a hearing because their contracts of membership include a duty to act fairly. By accepting them as members and receiving their subscriptions the respondent by implication undertakes to treat them justly and in accordance with the rules. (p 417 a-b)

[2] The appellant's allegations against the chairman remained mere allegations unsupported by evidence. The allegations related more to a past relationship between the appellant and the chairman and were not at all related to the subject matter of the proceedings before the DC. The mere fact that the appellant was not in the thickest of terms with the chairman, without other evidence, was not a conclusive ground to show that he was likely to be biased. (p 420 c & f-g)

[3] The complainant or prosecutor should not participate in a decision or in an appeal from a decision and should not even appear to participate therein. To do so will be contrary to the rules of natural justice. In the present case, LY Hong could not be regarded as a complainant or prosecutor. However, he admitted listening to the version given by Gitu and had expressed his displeasure of the appellant's conduct for being in a fight again. There was nothing to suggest that LY Hong had a personal grudge against the appellant but judging by his evidence before the DC he was not at all pleased with what had happened. He seemed to suggest that the appellant was partly to blame if not wholly to blame for the incident. In the circumstances, it might be difficult for him to act impartially in considering the appeal before the MC. (pp 421 d, h & 422 a)

[4] The fact that LY Hong sat on the MC to hear the appeal from the DC after having given evidence before the DC was contrary to the rule against bias. In this regard, it was not necessary for the appellant to prove actual bias. What he needed to show was merely a real likelihood of bias on the part of the tribunal hearing the appeal. The appellant's apprehension was justified. LY Hong who had a personal knowledge of the incident and was in fact called to give evidence before the DC might in all likelihood have a strong influence on the other members of the MC in the course of their deliberation. As a general rule a

witness after having given evidence should not be allowed to sit on the inquiry or the appellate body. Furthermore at the trial no evidence was adduced as to what had transpired in the MC during the hearing of the appeal. In the circumstances, the decision of the MC ought to be vitiated. (p 422 f-h)

[5] Melvin Loh should not have sat on the MC since he was responsible for submitting the report on the incident to the DC. This was contrary to the rule against bias. Further, the DC acted in breach of the principle of natural justice in refusing to supply the appellant with a copy of the report. It was no answer to state that the evidence therein did not prejudice the appellant. The court would not go into the likelihood of prejudice. The risk of such a prejudice was enough to vitiate the proceedings. The report from the house member was made available to all the members of the DC including the chairman but not the appellant despite his request for it. (pp 423 c-d & 425 d-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dan seorang yang bernama Gitu Chakravathy ('Gitu') adalah ahli-ahli sosial club responden. Mereka didakwa bergaduh sesama mereka di premis kelab tersebut. Masing-masing membuat aduan yang dirujuk kepada satu jawatankuasa tatatertib ('DC') yang dilantik oleh jawatankuasa utama ('MC') mengikut k. 35(a) peraturan-peraturan kelab. DC menggantung keahlian perayu selama empat bulan manakala keahlian Gitu digantung selama satu bulan. Perayu merayu kepada MC terhadap keputusan DC tersebut. MC menolak rayuan tersebut dan menaikkan perintah penggantungan dari empat ke enam bulan. Perayu kemudian memulakan tindakan di Mahkamah Tinggi, *inter alia*, untuk satu deklarasi bahawa keputusan-keputusan DC dan MC adalah batal dan tak sah dan untuk satu injunksi menghalang responden daripada menggantungnya dan menghalangnya daripada mengunakan premis kelab tersebut. Mahkamah Tinggi menolak tuntutan perayu. Maka rayuan ini.

Isu-isu yang dibangkitkan oleh perayu berkenaan pemakaian rukun-rukun keadilan asasi dan pembicaraan yang berpatutan. Dia membantah perlantikkan seorang bernama Paul Maneksha sebagai pengerusi DC atas alasan bahawa pengerusi tersebut tidak akan bertindak adil terhadapnya disebabkan perhubungannya yang lalu dengan perayu. Dia juga membantah kehadiran seorang yang bernama LY Hong dan seorang lagi yang bernama Melvin Low di dalam perjumpaan yang diadakan oleh MC di atas alasan

bahawa LY Hong memberikan keterangan kepada DC dan Melvin Low mengemukakan laporan mengenai kejadian tersebut yang menjadi aduan di depan DC. Perayu juga mendakwa perlanggaran jelas rukun-rukun keadilan asasi disebabkan laporan oleh Melvin Low tidak diberikan kepadanya dan dengan itu dia tidak dapat menjawab apa-apa dakwaan yang dibuat terhadapnya.

Diputuskan (membenarkan rayuan)
Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Responden adalah satu kelab sosial yang tertakluk kepada perlembagaan dan peraturan-peraturannya sendiri. Rukun-rukun keadilan asasi terpakai kepada responden. Dengan itu, ahli-ahli tidak boleh dipecat atau digantung sewenang-wenangnya oleh responden tanpa sebelumnya diberikan pembicaraan kerana kontrak keahlian mereka termasuk kewajipan untuk bertindak dengan adil dan saksama. Dengan menerima mereka sebagai ahli-ahli termasuk langganan mereka, responden secara implikasi bersetuju untuk memperlakukan mereka dengan adil dan saksama mengikut peraturan-peraturan.

[2] Dakwaan-dakwaan perayu terhadap pengerusi cuma dakwaan-dakwaan sahaja yang tidak disokong oleh keterangan. Dakwaan-dakwaan tersebut berkait rapat kepada satu perhubungan yang lalu di antara perayu dan pengerusi dan tidak berkait langsung kepada perkara prosiding di hadapan DC. Oleh kerana perayu tidak mempunyai perhubungan yang baik dengan pengerusi, tanpa keterangan lain, bukan satu alasan yang kukuh untuk menunjukkan kemungkinan berat sebelah di pihak pengerusi.

[3] Pengadu atau pendakwa tidak boleh mengambil bahagian di dalam satu keputusan atau di dalam satu rayuan daripada satu keputusan dan juga tidak boleh nampak sebagai mengambil bahagian di dalamnya. Untuk berbuat demikian bertentangan dengan rukun-rukun keadilan asasi. Dalam kes semasa, LY Hong tidak boleh dianggap sebagai pengadu atau pendakwa. Tetapi dia mengaku mendengar versi yang diberikan oleh Gitu dan telah menunjukkan rasa tidak senang hatinya terhadap kelakuan perayu kerana terlibat di dalam satu pergaduhan sekali lagi. Tidak ada apa-apa untuk menunjukkan bahawa LY Hong memyimpan perasaan dengki terhadap perayu tetapi berasaskan keterangan yang diberikannya di depan DC dia tidak langsung gembira dengan apa yang telah berlaku.

Dia kelihatan mempersalahkan perayu untuk sebahagian atau sepenuhnya. Maka, kemungkinan dia akan mendapati sukar untuk bertindak dengan adil dan saksama.

[4] Disebabkan LY Hong mengambil bahagian di MC untuk mendengar rayuan daripada DC selepas memberi keterangan kepada DC sebelumnya bertentangan dengan rukun berat sebelah. Dalam keadaan ini, tidak perlu untuk menunjukkan bahawa perayu mesti membuktikan berat sebelah. Apa yang perlu untuk ditunjukkannya adalah terdapatnya kemungkinan berat sebelah di pihak tribunal yang mendengar rayuan. Kebimbangan perayu berjustifikasi. LY Hong yang mempunyai pengetahuan peribadi mengenai kejadian tersebut dan yang juga dipanggil untuk memberi keterangan di depan DC berkemungkinan mempengaruhi ahli-ahli lain MC dalam pertimbangan mereka. Berdasarkan rukun am, seorang saksi selepas memberikan keterangan sepatutnya tidak boleh dibenarkan untuk mengambil bahagian di dalam satu siasatan atau badan rayuan. Lebih lagi, di dalam perbicaraan, tiada keterangan yang dikemukakan berkenaan apa yang telah berlaku di MC semasa pendengaran rayuan. Dengan demikian, keputusan MC adalah tak sah.

[5] Melvin Loh tidak sepatutnya mengambil bahagian di dalam MC disebabkan dia mengemukakan laporan kepada DC. Ini bertentangan dengan rukun berat sebelah. Lagi, DC bertindak bertentangan prinsip keadilan asasi apabila ia tidak memberikan salinan laporan tersebut kepada perayu. Ini tidak boleh dijawab dengan mengatakan bahawa keterangan di dalamnya tidak akan memprejudiskan perayu. Mahkamah tidak akan mempertimbangkan kemungkinan prejudis. Risiko prejudis sahaja memadai untuk mentaksahkan prosiding. Laporan daripada seorang ahli rumah diberikan kepada semua ahli DC termasuk pengerusi tetapi bukan kepada perayu meskipun ia meminta untuknya.

Case(s) referred to:

Andhra Pradesh State Road Transport Corporation v. Satyanarayan Transporters AIR [1965] SC 1303 ***(refd)***

BSS Kanda v. Government of the Federation of Malaya [1962] 28 MLJ 169 ***(foll)***

Chong Kah Lim & Ors v. Yong Su Hian [1979] 2 MLJ 11 ***(refd)***

Collins v. Lane, Cornish and Worcester Norton Sports Club Ltd [2003] LLR 19 ***(foll)***

Florence Bailes v. Ng Jit Leong [1985] 1 MLJ 74 ***(refd)***

Franklin v. Minister of Town and Country Planning [1948] AC 87 ***(refd)***

Lee v. Showmen's Guild of Great Britain [1952] 1 All ER 1175 ***(refd)***

Metropolitan Properties (FGC) Ltd v. Lannon [1969] 1 QB 577 ***(refd)***
Minolta Malaysia Sdn Bhd v. Ng Siew Phang & Anor [1996] 3 AMR 3421 ***(refd)***
R v. Gough [1993] AC 646 ***(refd)***
Rattan Lal Sharma v. Managing Committee AIR [1993] SC 2155 ***(refd)***
Re Singh Kalpanath v. Choor Singh [1992] 2 SLR 639 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(foll)***
Shrager v. Basil Dighton Ltd [1924] 1 KB 274 ***(refd)***
Singapore Amateur Athletics Association v. Haron Mundir [1994] 1 SLR 47 ***(refd)***

Other source(s) referred to:
MP Jain, *Treatise On Administrative Law,* 1996 edn, vol 1, p 421

Appellant in person
For the respondent - Jacy Rani Paloosamy; M/s Ong & Manecksha

[Appeal from High Court, Taiping; Civil Suit No: 22-21-1995]

Reported by Usha Thiagarajah

JUDGMENT

Arifin Zakaria JCA:
The appellant and one Gitu Chakravathy were members of the Penang Sports Club ("the club"). On 7 June 1995, they were alleged to have abused and assaulted each other within the club premises. Each had lodged a complaint against the other. The complaints were referred to the Disciplinary Committee ("D.C.") appointed by the Main Committee ("M.C.") pursuant to r. 35(a) of the Rules of the Club. (In this judgment any reference to a rule shall mean the rule in the Rules of the Club). The D.C. in this case comprised of the following members:

(i) P.R. Manecksha, an advocate & solicitor, as chairman;

(ii) Loo Choo Huat, a Senior Assistant Commissioner of Police (II), officer in charge of Criminal Investigations Department, Penang;

(iii) Foong Kai Choong, an advocate & solicitor; and

(iv) Paul Chong, a Quantity Surveyor.

The secretary of the club, Sunny Kumaraisen was appointed secretary of the D.C. pursuant to reg. 10 of the By-Laws of the Disciplinary Committee of the club.

At their first meeting held on 10 June 1995 the D.C. suspended both the appellant and Gitu Chakravathy under r. 35(j) pending the inquiry. It should be noted that Paul Chong was absent from this meeting.

The D.C. subsequently met on 27 June 1995 to hear the complaints against both the appellant and Gitu Chakravathy. At the conclusion of the inquiry on 6 July 1995 the D.C. found both the appellant and Gitu Chakravathy guilty as per charge and as a penalty the appellant was suspended for four months while Gitu Chakravathy was suspended for one month from the privileges of membership. The appellant was dissatisfied with the decision of the D.C. and he appealed to the M.C. against the said decision. The M.C. heard the appeal on 2 August 1995 and having dismissed the appeal, the M.C. enhanced the suspension order of the appellant from four to six months. The appellant then brought this action against the club seeking, *inter alia*, the following reliefs:

(a) a declaration that the D.C.'s decision dated 6 July 1995 and the M.C.'s decision dated 2 August 1995 are null and void and of no effect;

(b) an injunction to restrain the respondent from suspending and preventing the appellant from using the club's premises;

(c) damages; and

(d) interest and costs.

The High Court dismissed the appellant's claim with costs and hence this appeal.

The complaints by the appellant centred on the following issues:

(i) the chairmanship of the D.C.;

(ii) the composition of the M.C.;

(iii) the failure of respondent to furnish the report of house member, Melvin Low, to the appellant; and

(iv) the increase of the penalty imposed on the appellant by the M.C.

We shall deal with each of these complaints in the course of this judgment. Firstly we think it is essential for us to appraise the relevant law.

The issues raised by the appellant concern the application of the rules of natural justice requiring impartial adjudicators and fair hearing to domestic inquiry involving members of club, trade union or professional body. It is common ground that the respondent in the present case is a social club and it is governed by its own constitution and the Rules of the club.

It is not in dispute that the rules of natural justice does apply to a club like the respondent, therefore, members of the club could not arbitrarily be expelled or suspended without first being given a hearing, for their contracts of membership are held to include a duty to act fairly; by accepting them as members and receiving their subscription the club impliedly undertakes to treat them justly and in accordance with rules.

The question is: To what extent is the court likely to intervene in matters involving domestic tribunal of a social club, as in the present case, as opposed to tribunals sitting in judgment over matters of a trade or profession. The stand taken by the court is succinctly stated by Denning LJ in *Lee v. Showmen's Guild of Great Britain* [1952] 1 All ER 1175, at p. 1181:

> The question in the present case is: To what extent will the courts examine the decisions of domestic tribunals on points of law? This is a new question which is not to be solved by turning to the club cases. In the case of social clubs the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules, but will not otherwise interfere: see *Labouchere v. Earl of Wharncliffe* (18), *Dawkins v. Antrobus* (1). It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great, if not greater, than any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade he has to submit to

> the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say: "No". A man's right to work is just as important, if not more important, to him than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.

This approach as propounded by Denning LJ in *Lee v. Showmen's Guild (supra)* was cited with approval by the Federal Court in *Chong Kah Lim & Ors v. Yong Su Hian* [1979] 2 MLJ 11. In this context we would also refer to the case of *Singapore Amateur Athletics Association v. Haron bin Mundir* [1994] 1 SLR 47. In that case Warren LH Khoo J delivering judgment of the CA said at p. 59:

> Counsel is obviously right on the law. The jurisdiction of the courts in reviewing the decisions of domestic tribunals is clearly of a limited nature. The decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence. The function of the courts is to see that the rules of natural justice have been observed, and that the decision has been honestly arrived at. The court has no power to review the evidence for the purpose of deciding whether the tribunal came to a right conclusion. It is not the function of the court when exercising such supervisory jurisdiction to resolve issues of fact which are within the proper sphere of the tribunal's inquiry.

In the light of the principles set out above we will now consider the issues raised by the appellant before this court.

Firstly the appellant took objection to the appointment of Mr. Paul Manecksha as chairman of the D.C. on the ground of likelihood of bias against him. Having heard the evidence of both the appellant and Paul Manecksha, the learned judge held that there is no merit in the appellant's objection. He accepted the evidence of Paul Manecksha that he had no feeling of bias or animosity against the appellant.

The appellant contended that based on the authorities the chairman of D.C. must be above suspicion of bias and actual bias need not be proved. The Indian Supreme Court in *Andhra Pradesh State Road Transport Corporation v. Satvanaravan Transporters* AIR [1965] SC 1303 at p. 1306 observed:

> It is an elementary rule of natural justice that a person who tries a cause should be able to deal with the matter before him objectively, fairly and impartially. As has been observed in *Jewitt's Dictionary of English Law*, any thing which tends or may be regarded as tending to cause such a person to decide a case otherwise that on evidence must be held to be biased. If a person has a pecuniary interest in the case before him, that

> is an obvious case of bias which disqualifies him, to try the cause. If a person is hostile to a party whose cause he is called upon to try, that again would introduce the infirmity of bias and would disqualify him from trying the cause. In dealing with cases of bias it is necessary to remember that no one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind. The broad principle which is universally accepted is that a person trying a cause even in quasi-judicial proceedings, must be able to act above suspicion of unfairness.

Similarly in *Franklin v. Minister of Town and Country Planning* [1948] AC 87 at p. 103, L. Thankerton stated:

> ... the use of the word "bias" should be confined to its proper sphere. Its proper significance is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that having to adjudicate as between two or more parties he must come to his adjudication with an independent mind, without any inclination or bias towards one side or the other in dispute.

As often been said, justice should not only be done, but should manifestly and undoubtedly be seen to be done. In other words whether justice has been done or not in a given case is necessarily a question of perception. As Atkins LJ said in *Shrager v. Basil Dighton Ltd.* [1924] 1 KB 274 at p. 284:

> Next to the tribunal being in fact impartial is the importance of its appearing so.

Lord Denning in *Metropolitan Properties (FGC) Ltd. v. Lannon* [1969] 1 QB 577 had propounded the "reasonable people" test. The House of Lords in *R. v. Gough* [1993] AC 646, at least in criminal case, prefers the test of "real danger" or "real likelihood". This is expressed in the judgment of Lord Goff at p. 670 when he said:

> I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices of members of inferior tribunals, or with jurors, or with arbitrators. ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

The test as propounded by the House of Lords is clearly more objective than the earlier test as propounded by L. Denning MR.

The appellant's contention is that the chairman, on account of his past relationship with the appellant, would not be in a position to act fairly. The appellant listed 13 grounds in support of his objection. The chairman in his evidence refuted all the allegations made by the appellant and stated categorically that he harbours no feeling of bias or animosity against the appellant. The appellant did not call any witness to support the allegations. In other words the allegations against the chairman remain mere allegations unsupported by evidence. Furthermore, it is observed that these allegations relate more to past relationship between the appellant and the chairman and is not at all related to the subject matter of the proceeding before the D.C. The authorities cited to us by the appellant deal with instances where the conduct of a member of the tribunal under challenge relate directly to the subject matter of inquiry before the D.C. Take for instance, the case of *Re Singh Kalpanath v. Choor Singh* [1992] 2 SLR 639, there the appellant who is an advocate and solicitor, was found guilty of misconduct by the disciplinary committee. The complaint was against the chairman who was alleged to have met with the applicant's legal assistant twice during the pendency of the hearings and had threatened or warned the legal assistant and suggested to him that he had made up his mind about the veracity of the witness. Similarly in the case of *Florence Bailes v. Ng Jit Leong* [1985] 1 MLJ 74 where a committee member of the club who took part and deliberated in the disciplinary proceeding before the committee is found to have personal interest in the outcome of the inquiry because of his personal relationship with the complainant.

In the present case we agree with the learned trial judge that there is no cogent evidence to support the appellant's allegations against the chairman of the D.C. and in any event the allegations are not at all related to the matter before the D.C. The mere fact that the appellant is not in the thickest of term with the chairman of the D.C., that alone, in our view, without other evidence, would not be conclusive ground that he is likely to be biased. (See *Minolta Malaysia Sdn. Bhd. v. Ng Siew Phang & Anor* [1996] 3 AMR 3421.

Secondly, the appellant complained against the presence of L.Y. Hong and Melvin Low at the M.C. meeting. L.Y. Hong had given evidence before the D.C. while Melvin Low was the author of the report dated 7 June 1995, a copy of which was given to the chairman and all the other members of the D.C. He contended that by allowing these two gentlemen to attend the

M.C. meeting hearing the appeal by the appellant against the D.C.'s decision the respondent had acted in breach of the rule of natural justice and for that reason the decision of M.C. ought to be vitiated.

In supporting his arguments the appellant relied heavily on the case of *Rohana bte. Ariffin & Anor. v. Universiti Sains Malaysia* [1989] 1 MLJ 487. In that case the applicants were lecturers charged with offences under Universiti Sains Malaysia (Discipline Rules) 1979. They were both found guilty by the disciplinary authority. They then applied to the High Court by way of *certiorari* to have the finding of the disciplinary authority quashed. One of the grounds advanced before the High Court was that the complainant, the registrar of the university, was present during the proceedings before the disciplinary authority. It should, however, be emphasized that in that case the court found the registrar was very far from being a mere nominal complainant and had shown active partisanship in the proceedings before the disciplinary authority. The High Court allowed their application and quashed the decision of disciplinary authority. The principle that may be distilled from that case and the line of authorities referred to in that case is that, the complainant or prosecutor should not participate in a decision or in an appeal from a decision, and should not even appear to participate; to do so would be contrary to the rule of natural justice.

In the case before us, L.Y. Hong was called as a witness before the D.C. His evidence before the D.C. is brief, it reads:

> G5 - Mr. L.Y. Hong –
>
> By P.R. Manecksha –
>
> On that night, the supervisor came in to the meeting and asked for the house member. I am the bar chairman. I together with some other committee members went to the bar. I listened to what Gitu had to say. Then Hari Singh came and said I shouldn't listen to one side. I scolded Hari and asked him to shut up and said he and you promised not to fight. Yet he's fighting again. Hari Singh left the bar. After that – I met Darshan. He said I listened to one side and I told him you promised not to fight and you did it again.

From his evidence we do not think L.Y. Hong could by any mean be regarded as a complainant or prosecutor in this case. However, in his evidence he admitted listening to the version given by Gitu Chakravathy and had expressed his displeasure of the appellant's conduct for being involved in a fight again. There is nothing to suggest that L.Y. Hong had any personal grudge against the appellant, however, judging by his evidence

before the D.C. he was not at all pleased with what happened that night and seems to suggest that the appellant was partly to blame if not wholly to blame for the incident. In the circumstances, we think it may be difficult for him to act impartially in considering the appeal before the M.C.

As stated by the learned author, M.P. Jain in his book *Treatise On Administrative Law* 1996 edn. vol. I p. 421, "A judge knowing the facts from inside may feel that there was no bias in the decision maker, but a reasonable man looking at the same facts externally may still feel that justice was not done in the instant case. In this context, therefore, the test of 'actual bias' gives place to the broader test of 'real likelihood of bias'. Needless to say, where actual bias exists, administrative proceedings will be vitiated. But actual bias is not always necessary for this purpose. Even where there is 'real likelihood of bias', proceedings are vitiated."

In *Rattan Lal Sharma v. Managing Committee* AIR [1993] SC 2155 the Supreme Court of India observed:

> ... the test is not whether in fact a bias has affected the judgment: the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done but must be seen to be done.

The other complaint against L.Y. Hong is that having given evidence before the D.C. he then sat on the M.C. to hear the appeal from the D.C. To allow such practice the appellant contended is to allow him to act both as a witness and as a judge at the same time. This, the appellant contended is contrary to the rule against bias. In this regard we agree that it is not necessary for the appellant to prove actual bias, what he needs to show is merely a real likelihood of bias on the part of tribunal hearing the appeal. In the present case we feel that the appellant's apprehension is justified. This may arise from the fact that L.Y. Hong, who had personal knowledge of the incident and was in fact called to give evidence before D.C., may in all likelihood have a strong influence on the other members of the M.C. in the course of their deliberation. For that reason as a general rule a witness after having given evidence should not be allowed to sit on the enquiry or the appellate body. Further more, at the trial, no evidence was adduced as to what had transpired in the M.C. during the hearing of the appeal. On the above premises we hold that the decision of the M.C. ought to be vitiated.

The second complaint by the appellant also relates to the composition of the M.C. when considering the appeal from the decision of the D.C. This time the complaint is against one Melvin Loh who also sat as a member of the M.C. It is part of the agreed facts that Melvin Loh, who was a house member, did submit a report to the D.C. regarding the incident on the night in question. This report appears at p. 385 of the appeal record. The report stated that, Mr. Vijay, the supervisor of the club, informed him that there was a fight in the bar. He then went to investigate. He met Mr. Gitu Chakravathy, one of the complainants, who led him to the toilet and narrated to him what had happened. Later on, the appellant saw him and told him his version of the incident.

Melvin Loh did not give evidence before the D.C. but his report was made available to the members of the D.C. In view of that the appellant contended that Melvin Loh should not have sat on the M.C. as he was involved in the investigation and had submitted a report to the D.C., which in fact forms the complaint before the D.C. After considering the content of the report we find that there are merits in the appellant's contention. We are of the view that since he was responsible for putting up the report, he should not have sat on the M.C. To do so would be contrary to the rule against bias. This view finds support in the case of *Collins v. Lane, Cornish and Worcester Norton Sports Club Ltd.* [2003] LLR 19. In that case, the appellant, who was a member of Worcester Norton Shooting Club, was removed from the membership of the club by the committee. He brought a motion against the club, the motion was dismissed by the recorder who heard the case. On appeal to the Court of Appeal, his claim was allowed. One of the grounds in allowing the appeal was that the chief range officer who was responsible for putting the complaints before the committee on behalf of the range officers took part in the decision. In the circumstances the Court of Appeal held that the rule against bias was undermined.

The other issue raised by the appellant is the failure of the club to furnish him with the report of Melvin Low dated 7 June 1995, a copy of which was made available to the chairman and the other members of the D.C. According to the agreed facts, on 12 June 1995 the appellant requested for a copy of the report. The request was denied. The appellant contended that this constitutes another blatant breach of the rule of natural justice which stems from the basic principle that a person stand charged before the D.C. ought to be given whatever report made available to the D.C. in order that he may answer any allegations that may be made against him. This limb of the rule of natural justice is succinctly stated by Edgar Joseph J (as he then was) in *Rohana bte. Ariffin & Anor v. Universiti Sains Malaysia (supra)* where at p. 493 he stated:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R v. Layland, Justices ex p Howthorn.*

At the hearing before the court the chairman of the D.C. defended his ground for not supplying the report to the appellant. In his evidence he said:

> As regards allegation in para 7(b) of the statement of claim the plaintiff could have called the house member Melvin Loh as witness at the enquiry if he wished to. The D.C. did not take into account any report made by this Melvin Loh.

In *BSS Kanda v. Government of the Federation of Malaya* [1962] 28 MLJ 169 there the appellant was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. One of the grounds raised before the Privy Council was that the Report of the Board of Inquiry, which was sent to the adjudicating officer, was not made available to the appellant until the fourth day of the trial before the High Court. The issue is, whether the hearing before the adjudicating officer was vitiated by him being furnished with that report, without the appellant being given the opportunity to contradict or correct the report. L. Denning delivering judgement of the Privy Council said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must, be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v. Rice* down to the decision of their Lordships' Board in *Ceylon University v. Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were R*e Gregson, Rex v. Bodmin Justices* and *Goold v. Evans* to which might be added *Rex v. Architects Registration Tribunal*, and many others.

> Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

From the above authority, it is no answer to say that the evidence does not prejudice the appellant, as the court will not go into the likelihood of prejudice. As the Privy Council puts it, the risk of such a prejudice is enough to vitiate the proceeding. In the present case it is part of the agreed facts that the report from the house member was made available to all the members of the D.C. including the chairman but the same was not given to the appellant despite his request for the same to be made available to him. Thus following *Rohana bte. Ariffin & Anor (supra)* and *BSS Kanda v. Government of the Federation of Malaya (supra)* we hold that the D.C. had acted in breach of the principle of natural justice in refusing to supply the appellant with a copy of the report by Melvin Loh.

In view of our findings above we feel that it is not necessary for us to consider the question whether the M.C. has the right under r. 35(e) to increase the penalty imposed on the appellant.

For the reasons indicated above we would allow this appeal and make an order in terms of prayers (a) and (c) of the statement of claim. We would also award costs to the appellant both here and in the court below. The deposit is to be refunded to the appellant.

The case is remitted to the Taiping High Court for assessment of damages before the learned senior assistant registrar.